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Recognition of foreign judgments and cross-border insolvencies

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Abstract:

In the joined appeals of *Rubin v Eurofinance* and *New Cap Reinsurance v Grant*, the Supreme Court held that first, the traditional rules on recognition and enforcement of foreign judgments applied to judgments in insolvency proceedings, and secondly, the act of lodging proof in foreign insolvency proceedings by a creditor meant that he had submitted to the jurisdiction of the supervising court. This article considers these decisions and suggests that the ruling in *Rubin* is sound while that in *New Cap* is unfounded. Further, assuming instead that the law is ripe for reform, this article considers what might be appropriate recognition and enforcement rules for judgments in insolvency proceedings.

A. Introduction

Dicey, Morris, and Collins's Rule 43[1] identifies four situations in which a foreign judgment *in personam* is entitled to recognition and enforcement at common law: where the judgment debtor (i) was present in the foreign country at the time the proceedings were instituted; (ii) was a claimant or counterclaimed in the foreign proceedings; (iii) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings; or (iv) agreed, prior to the commencement of the proceedings, to submit to the jurisdiction of that court in respect of the subject matter of the

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[1] L Collins (gen ed), *Dicey, Morris and Collins: The Conflict of Laws*, 15th edn (Sweet & Maxwell, London, 2012), [14R-054] (hereafter *Dicey, Morris and Collins*).

proceedings. These four alternative criteria give the foreign court international jurisdiction in our eyes. The issue which arose in *Rubin v Eurofinance*[2] was whether *Dicey*'s Rule 43 applies to judgments in insolvency proceedings. The Court of Appeal had decided that it did not.[3] The answer given by the Supreme Court, by a four to one majority, was a resounding "yes".

This article considers whether the Court of Appeal or Supreme Court approach is preferable. It should be noted that special rules for the recognition and enforcement of judgments in insolvency proceedings can be found in the EU Insolvency Regulation.[4] The Cross-Border Insolvency Regulations 2006,[5] which incorporates the UNICTRAL Model Law on Cross-Border Insolvency into the law of Great Britain, was held in *Rubin* not to cater for the enforcement of foreign judgments.[6]

The focus of this article, however, is the common law. The primary aim is to examine whether judgments rendered in cross-border insolvencies should be considered to be *sui generis* and falling outside the normal rules of private international law. *Rubin* is, of course, the catalyst for this study and before going into further detail on the issues that will be examined in this article, it seems appropriate first to set out the facts and decision in *Rubin.*

B. *Rubin v Eurofinance*[7]

Rubin v Eurofinance involved The Consumers Trust (TCT), a trust set up by Eurofinance, a company established by Adrian Roman and incorporated in the British Virgin Islands. TCT carried on a sales

[2] [2012] UKSC 46; [2013] 1 AC 236.

[3] [2010] EWCA Civ 895; [2011] Ch 133.

[4] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] L 160/1 (hereafter Insolvency Regulation).

[5] SI 2006/1030.

[6] [2013] 1 AC 236, [142-143]. The Supreme Court was unanimous on this point.

[7] [2013] 1 AC 236.

promotion scheme selling cashable vouchers to customers in the USA and Canada. The scheme was essentially designed to ensure that customers who had bought the vouchers would find it extraordinarily difficult to obtain the rebates promised under the scheme. TCT was placed into Chapter 11 bankruptcy proceedings in New York. Prior to that, TCT had transferred a substantial amount of the money it had received from sale of the vouchers to the defendants, *ie*, Eurofinance, and sons of Adrian Roman. In October 2007, the US Bankruptcy Court approved a Chapter 11 plan of liquidation under which the appointed receivers were given the power to commence proceedings against the defendants to obtain the funds that TCT had channeled to them. "Adversary proceedings" pursuant to the US Bankruptcy Code were duly commenced in the US Bankruptcy Court in December 2007. The defendants deliberately chose not to appear before the court and default judgment was handed down against them in unjust enrichment and restitution and for the reversal of fraudulent preferences and payments out. The receivers then applied to the English courts for, *inter alia*, the enforcement of the US judgments.

Given that the defendants were neither present in the US nor had submitted to the US Bankruptcy Court's jurisdiction, the normal requirements set out in the rules for the recognition and enforcement of foreign judgments at common law were patently not satisfied. The receivers failed at first instance.[8] On appeal, the Court of Appeal drew on two decisions, one of the Privy Council[9] and another of the House of Lords,[10] *en route* to deciding that judgments rendered in insolvency proceedings[11] were not subject to the normal common law recognition and enforcement of foreign judgment rules but were to be governed by *sui generis* private international law rules. It was persuaded of the merits of

[8] [2009] EWHC 2129 (Ch); [2010] 1 All ER (Comm) 81.

[9] *Cambridge Gas Transport Corp v Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508.

[10] *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21; [2008] 1 WLR 852; [2008] Lloyd's Rep IR 756.

[11] The adversary proceedings were held to be part and parcel of the US insolvency proceedings.

universalism,[12] under which one main insolvency proceedings should receive worldwide recognition and apply universally to all the debtor's assets.[13] Since the US proceedings were recognised in England as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006,[14] the English court ought to actively assist by doing whatever it could have done in a domestic insolvency case;[15] active assistance extended to enforcing the New York court orders at common law.[16]

In one bold stroke, the Court of Appeal decision created a third category of foreign judgments; in addition to judgments *in personam* and judgments *in rem*, there was to be a separate category of judgments in insolvency proceedings with its own rules for the recognition and enforcement thereof. On appeal however, the Supreme Court, by a majority of four to one, restored the status quo. While the Court of Appeal had thought that its decision represented a "desirable development"[17] of the common law, a majority of the Supreme Court thought otherwise. Lord Collins, delivering the majority judgment,[18] held that the Court of Appeal decision "would not be an incremental development of existing principles, but a radical departure from substantially settled law."[19] His Lordship was of the

[12] On which, see *infra*, section D(i).

[13] [2011] Ch 133, [62].

[14] SI 2006/1030.

[15] [2011] Ch 133, [62].

[16] Having reached this conclusion on the basis of the common law, the Court of Appeal found it unnecessary to decide whether the New York judgment was enforceable under the Cross-Border Insolvency Regulations 2006.

[17] [2011] Ch 133, [160].

[18] Lord Walker and Lord Sumption agreed with Lord Collins. Lord Mance, who was also in the majority, delivered a separate reasoned judgment as he disagreed with Lord Collins on whether *Cambridge Gas* [2007] 1 AC 508 was wrongly decided. Lord Clarke dissented.

[19] [2013] 1 AC 236, [128].

opinion that neither principle nor policy dictated having a more liberal rule for insolvency judgments. Moreover, his Lordship was not sure what shape any new rules ought to take.[20]

This is not the end of the story. Another case, *New Cap Reinsurance v Grant* was heard together with the *Rubin* appeal. This case involved New Cap, an Australian company conducting business exclusively in Australia, which had reinsured members of the Lloyd's Syndicate. A commutation agreement under which New Cap made lump sum payments to the Syndicate in order to be released from the reinsurance contracts was subsequently concluded. New Cap was then wound up and its liquidator sued the Syndicate in New South Wales alleging that the lump sum payments were unfair preferences and voidable. The Syndicate did not appear before the New South Wales court and judgment was entered against it. The New South Wales court issued a letter of request asking the English court to "act in aid of and assist" the Australian court pursuant to section 426 of the Insolvency Act 1986. This time the Supreme Court spoke with one voice on whether the New South Wales judgment was enforceable in England. It was held that section 426 of the Insolvency Act was not available as a tool for enforcement of foreign judgments. It then remained to be examined whether the New South Wales judgment could be enforced at common law. The Syndicate had not taken any steps in the avoidance proceedings in New South Wales. However, it had submitted proofs of debt and attended and participated in creditors' meetings. Citing *Ex parte Robertson, In re Morton*,[21] Lord Collins stated that these steps indicated that the Syndicate had submitted to the jurisdiction of the New South Wales court: "It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding."[22]

Set out thus, the reasoning at the various levels of the decisions of *Rubin* and *New Cap* provide several fruitful lines of inquiry. The big overarching question is whether judgments in insolvency proceedings

[20] [2013] 1 AC 236, [117].

[21] (1875) LR 20 Eq 733.

[22] [2013] 1 AC 236, [167].

ought to be governed by a different set of recognition and enforcement rules. Towards that end, first, it will be considered if workable rules for the recognition and enforcement of foreign judgments in insolvency proceedings can be formulated. Secondly, should judgments in insolvency proceedings, as a matter of policy, be subject to special recognition and enforcement rules? Proponents of special treatment for judgments in insolvency proceedings would presumably cite the principle of universalism and the need for modernisation of the common law recognition and enforcement rules, but other factors also require consideration. Thirdly, the Supreme Court's decision in *New Cap*, although ostensibly an application of the normal rules of recognition and enforcement of judgments, involves widening the scope of acts that are considered as submission to the foreign court. Is this warranted?

C. Can workable recognition and enforcement rules for judgments in insolvency proceedings be formulated?

One of the reasons underlying the majority judgment in *Rubin* was that it may prove difficult for the court to develop new rules to cater to judgments in insolvency proceedings.[23] The aim of this section is to test this assumption.

(i) Can judgments in insolvency proceedings be identified clearly?

If one proposes to have different recognition and enforcement rules for judgments in insolvency proceedings as opposed to other proceedings, the first logical step would be to determine if judgments in insolvency proceedings can be differentiated sufficiently from other judgments so as to enable the application of different rules.

A potential starting point might be to take *Halford v Gillow*, where Shadwell V-C held that:

[23] [2013] 1 AC 236, [117-127].

"the jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate; but has not power to determine what *is* the bankrupt's estate. … when you have determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the court in bankruptcy."[24]

However, this delineation is too broad. Taken literally, it would seem that even some insolvency specific claims, would not, strictly speaking, fall within a court's insolvency jurisdiction. For example, under the Insolvency Act 1986, the insolvency office-holder will have to apply to court to get the effects of an unfair preference[25] or a transaction at an undervalue[26] reversed. Such avoidance claims are the epitome of claims peculiar to insolvency law.[27] If successful, the court may order, for example, the revesting of the property to the insolvent company.[28] The court's judgment therefore determines the content of the insolvent estate and, on a literal construction of what was said in *Halford*, would fall outside the court's bankruptcy jurisdiction. However, *Halford* concerned a claim of breach of trust committed by the bankrupt trustee; the circumstances were far removed from claims that are specific to insolvency law.[29] The court was anxious to hold that it (a Court of Equity) retained jurisdiction to hear the breach of trust claim.

A more modern division can be found in Lord Hoffmann's dictum in *Cambridge Gas Transport Corp v Navigator Holdings*.[30] *Cambridge Gas* involved a New York court order seeking to strip Cambridge Gas of its rights in shares in Navigator Holdings, a Manx company, in favour of a creditors' committee

[24] (1842) 13 Sim 44, 50 (emphasis in original).

[25] Insolvency Act, s 239.

[26] Insolvency Act, s 238.

[27] *Rubin* [2013] 1 AC 236, [198].

[28] Insolvency Act 1986, s 241.

[29] *Rubin* [2011] Ch 133, [49] (CA).

[30] [2007] 1 AC 508.

pursuant to Chapter 11 proceedings filed by Navigator. Cambridge Gas was neither present in New York nor had submitted[31] to the New York court. The New York court also obviously had no jurisdiction to affect title to shares of a Manx company. Thus, whether the New York court order was viewed as a judgment *in personam* or judgment *in rem*, the order was not entitled to enforcement in the Isle of Man on orthodox principles. However, Lord Hoffmann held that:

"Judgments *in rem* and *in personam* are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. … The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."[32]

Three of their Lordships in *Rubin v Eurofinance* thought that *Cambridge Gas* had been wrongly decided;[33] Lord Collins observed that the New York court order was in reality an *in rem* order.[34] Given that the New York court itself was aware that it required the assistance of the Manx court to achieve its order, the description of it being *in rem* in nature sits rather uneasily. Nevertheless, being an order which sought to strip Cambridge Gas of its rights in the Navigator shares and give them to another, it

[31] The Privy Council stated that the claim of non-submission was said to be "technical in the highest degree" ([2007] 1 AC 508, [8]) as Vela, Cambridge Gas's parent company had participated in the Chapter 11 proceedings and the same person controlled Vela, Cambridge Gas and Navigator.

[32] [2007] 1 AC 508, [13-14].

[33] [2013] 1 AC 236, [132]. It ought to be noted that the US generally considers its bankruptcy jurisdiction to be *in rem* jurisdiction: Look Chan Ho, "Navigating the Common Law Approach to Cross-Border Insolvency" (2006) 22 *Insolvency Law & Practice* 217.

[34] [2013] 1 AC 236, [103].

patently fell under the category of "judicial determinations of the existence of rights … over property."[35]

It does seem rather unreal to deem that insolvency proceedings do not involve the delivery of any judgments or the determination of any rights.[36] For example, there may be a dispute as to the extent of the debtor's liabilities. The validity of proofs of debt will have to be decided. There may be an issue of whether the debtor owns certain assets. Further, as far as the winding up of a company under English law is concerned, the effect of a winding up order is to convert a creditor's *in personam* rights into a beneficial interest in a fund of the company's property that is held by the liquidator.[37] Schemes of arrangement, which require judicial sanction,[38] also patently involve the determination of rights. As the Privy Council itself described in *Cambridge Gas*:

"it is the object of such a scheme to give effect to an arrangement which varies or extinguishes the rights of creditors and shareholders. Thus, in the case of an insolvent company, in which the shareholders have no interest of any value, the court may sanction a scheme which leaves them with nothing …. The scheme may divest the company of its assets and leave the shareholders with shares in an empty shell. It may extinguish their shares and recapitalise the company by issuing new shares to others for fresh consideration. Or it may … provide that someone else is to be registered as holder of the shares."[39]

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[35] *Cambridge Gas* [2007] 1 AC 508, [13].

[36] CH Tham, "Insolvency Proceedings and Shareholdings: When is a Foreign Judgment Not a Judgment?" [2007] *LMCLQ* 129, 132; Look Chan Ho (2006) 22 *Insolvency Law & Practice* 217; A Briggs, "Decisions of British Courts in 2006" (2006) 77 *BYIL* 554, 578.

[37] *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167.

[38] Companies Act 2006, Part 26.

[39] [2007] 1 AC 508, [26].

The fact that these may be thought to be merely "incidental procedural matters"[40] cannot obscure the fact that the settling of proofs of debt, the ascertainment of property of the debtor, and the variation, extinction, and conversion of rights of creditors and shareholders pursuant to the winding up process all obviously involve the determination of rights.[41] The Irish Supreme Court in *In re Flightlease (Ireland) Ltd*[42] refused to follow *Cambridge Gas* on the ground that the fact of insolvency proceedings in the background did not alter the essential *in personam* nature of a Swiss judgment ordering Flightlease to repay a sum of money to Swissair, which was undergoing a debt restructuring liquidation. Without either criterion of presence or submission satisfied, any Swiss judgment was not entitled to enforcement according to Irish conflict rules.

Whether the proceedings involve the determination of rights or the collective enforcement of rights may thus not be the best question to ask when trying to discern if insolvency proceedings are truly different from other proceedings.

Focussing on the nature of the claim, in the sense of assessing whether the claim is founded on contract, tort, restitution or the insolvency proceedings, yields no better dividends. In *Rubin v Eurofinance*, part of the US court order dealt with claims founded on unjust enrichment and restitution. Yet no attempt was made to differentiate between these claims and the insolvency specific claims. Further, Lord Collins in *Rubin* has stated that there is no difference in principle between, on the one hand, claims based on general law, such as contractual or tortious claims or a claim to recover a debt, and, on the other hand, avoidance claims, which are peculiar to insolvency law. Both types of claims establish a liability to pay or repay money to the insolvent estate and affect the size of the insolvent

[40] *Cambridge Gas* [2007] 1 AC 508, [15].

[41] In fact, Lord Clarke in *Rubin* thought that the Privy Council in *Cambridge Gas* accepted that an avoidance order may be both an order *in personam* or *in rem* and an order in the bankruptcy proceedings: [2013] 1 AC 236, [195].

[42] [2012] IESC 12, [2012] 1 IR 722.

estate.[43] Thus his Lordship did not see why more generous recognition and enforcement rules ought to apply to a buyer or debtor who deals with the estate as opposed to a seller or creditor.[44]

In addition, one could also argue that there is no difference in principle between avoidance claims and unjust enrichment claims because avoidance claims are also in essence restitutionary in nature. It has been observed that, under UK law at least, all but two of the grounds of avoidance in insolvency law has as its underlying policy the reversal of unjust enrichment, albeit "unjust enrichment" is used not in its full legal technical sense of subtractive unjust enrichment but rather to denote the conferment of an unfair benefit to one party in comparison with the general body of creditors.[45] The buyer of company property which is sold at an undervalue, the seller of property to the company at an inflated price, or the recipient of monies from an insolvent company or soon-to-be insolvent company, is, in this sense, unjustly enriched.

Perhaps a better route is to take a leaf from the EU Regulations. Insolvency proceedings have to be identified as they fall within the Insolvency Regulation[46] rather than the Brussels I Regulation.[47] Article 1 of the Insolvency Regulation states that it "shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator." Article 1(2)(b) of the Brussels I Regulation excludes "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings"

[43] [2013] 1 AC 236, [114].

[44] [2013] 1 AC 236, [116].

[45] R Goode, *Principles of Corporate Insolvency Law*, 4th edn (Sweet & Maxwell, London, 2011), [13-03].

[46] [2000] L 160/1.

[47] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] L 12/1 (hereafter Brussels I Regulation). See also the Brussels I Regulation (recast), Regulation (EU) No 1215/2012 of 12 December 2012 [2012] L 351/1 which will apply from 10th Jan 2015 (hereafter Brussels I Regulation (recast)).

from its scope.[48] The two provisions are designed to "dovetail almost completely with each other"[49] so that an action which falls within the bankruptcy exclusion of the Brussels I Regulation ought ordinarily fall within the Insolvency Regulation.

What is revealed by the case law, from the European Court of Justice (ECJ) and national court decisions is as follows. Generally, actions which fall within the scope of the Insolvency Regulation and within the bankruptcy exclusion of the Brussels I Regulation are actions which derive directly from insolvency proceedings and are closely connected with them.[50] This general principle has been quite narrowly construed. First, actions that are based on insolvency specific legislation are usually deemed to fall outside the Brussels I Regulation (and consequently ought to fall within the Insolvency Regulation). For example, an order that the *de facto* manager of a company in liquidation pay a certain sum into the assets of the company pursuant to French bankruptcy law,[51] and claims to reverse an unfair preference[52] or a transaction at an undervalue[53], which, under UK law at least, are based on provisions of the Insolvency Act 1986, can be said to derive directly from the insolvency.[54] The ECJ has held in

[48] The wording of this exclusion has remained unchanged from the Brussels Convention (Article 1(2)) to the Brussels I Regulation (recast) (Art 1(2)(b)). Equivalent provisions in successive instruments are to be interpreted in the same manner: *SCT Industri AB (in Liquidation) v Alpenblume AB (Case C-111/08)* [2009] ECR I-5655.

[49] P Schlosser, *Report on the Brussels Convention* [1979] OJ C 59/71, [53]. See also M Virgos and E Schmidt, *Report on the Convention on Insolvency Proceedings*, [77] (most easily accessible in I Fletcher, *Insolvency in Private International Law*, 2nd edn (OUP, Oxford, 2005), Appendix VII); *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); [2011] ILPr 34, [47].

[50] *Gourdain v Nadler (Case 133/78)* [1979] ECR 733.

[51] *Ibid*.

[52] Insolvency Act, s 239.

[53] Insolvency Act, s 238.

[54] *UBS AG v Omni Holding AG (in liquidation)* [2000] 1 WLR 916, 922.

Seagon v Deko Marty Belgium NV[55] that an action to set aside a transaction by virtue of a debtor's insolvency, being an action which may only be brought by the liquidator with the sole purpose of protecting the interests of the general body of creditors, falls within the scope of the Insolvency Regulation. However, if those actions could have been pursued as part of general law, they have been held not to relate sufficiently closely to the insolvency proceedings even when pursued as part of the insolvency process. The essential question is: "Is bankruptcy the principal subject matter of the proceedings?"[56] There have been a series of English cases to the effect that claims to determine the ownership of assets alleged to form part of the insolvent estate are not sufficiently connected to the insolvency proceedings, even though such claims may be based on provisions of the Insolvency Act, if those claims could have been pursued based on general law.[57] Conversely, a judgment ordering the reversal of a transfer of shares effected in the course of insolvency proceedings where the liquidator lacked the power to dispose of the assets has been held to fall within the bankruptcy exception of the Brussels I Regulation. [58] It goes without saying that actions based on general law itself would not have insolvency as its principal subject-matter, as they could have been pursued outside the insolvency context.[59] This is so even though the relief sought will bolster the size of the insolvency estate[60] or the

[55] *Case C-339/07* [2009] ECR I-767; [2009] 1 WLR 2168.

[56] *Ashurst v Pollard* [2001] Ch 595, 602.

[57] *Re Hayward* [1997] Ch 45; *Ashurst v Pollard* [2001] Ch 595; *Byers v Yacht Bull Corp* [2010] EWHC 133 (Ch), [2010] IL Pr 24.

[58] *SCT Industri AB (in Liquidation) v Alpenblume AB (Case C-111/08)* [2009] ECR I-5655.

[59] *Re Hayward* [1997] Ch 45.

[60] Eg, recovery of a patent from an employee of an insolvent company (*Duijnstee v Goderbauer (Case 288/82)* [1983] ECR 3663); a claim for damages for breach of statutory duty and breach of fiduciary duty (*QRS 1 ApS v Frandsen* [1999] 1 WLR 2169); a claim by a liquidator to recover debts due to the debtor (*UBS AG v Omni Holding AG (in liquidation)* [2000] 1 WLR 916; *Re Societe GPS* [2005] IL Pr 48 (Cour de Cassation)).

judgment will determine the validity of a creditor's proof of debt,[61] both of which ultimately affect the collective distribution process. For example, in *German Graphics Graphische Maschinen GmbH v van der Schee*,[62] the ECJ determined that an action by a creditor invoking a reservation of title clause in its favour over certain machines in a contract between itself and the insolvent company was independent of the insolvency proceedings as it was not based on the law of insolvency proceedings and required neither the opening of such proceedings nor the involvement of a liquidator.

Further, the mere fact that one of the litigants is the insolvency office holder is not sufficient,[63] unless the action involves either the internal management of the insolvency process or the conduct of the insolvency office holder.[64] That said, if the insolvency office holder is not involved in the action at all, the chances of the action being classified as pertaining to the insolvency process are considerably lower. In *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"*, [65] the insolvent company had transferred money to the defendant to put the sums beyond its sole creditor's reach. The liquidator assigned the insolvent company's right to have the transfer set aside to the creditor. The question before the ECJ was whether the action by the creditor against the defendant fell within the bankruptcy exclusion of the Brussels I Regulation. The action was linked with the insolvency proceedings as it originated in the liquidator's exclusive right to have a transaction set aside under the relevant national law, in this case, German law. Nevertheless, the ECJ held that there were significant differences between the right exercised by the creditor and the right that could have been exercised by the

[61] Eg, *UBS AG v Omni Holding AG (in liquidation)* [2000] 1 WLR 916: a question of construction of a pre-liquidation contract entered into by the debtor with a creditor where the construction thereof would have determined the validity of the creditor's proof of debt.

[62] *Case C-292/08* [2009] ECR I-08421.

[63] *Ashurst v Pollard* [2001] Ch 595, 602.

[64] *Polymer Vision R&D v Van Dooren* [2011] EWHC 2951 (Comm); [2012] IL Pr 14.

[65] *Case C-213/10* [2012] IL Pr 24.

liquidator: the creditor was not obliged to pursue the claim unlike a liquidator who was bound to act in the interests of creditors; the creditor could act for his own personal benefit; the creditor's right to pursue the action remained even upon the closure of the insolvency proceedings.[66] *F-Tex SIA* demonstrates that the fact that the action would not have existed but for the insolvency does not suffice.[67]

Set out thus, the case law on the EU Regulations demonstrates that there is a series of workable principles under which one could differentiate between, on the one hand, insolvency and sufficiently closely-related to insolvency proceedings, and, on the other hand, "other" proceedings. It is fair to say that there will inevitably be some cases in which the line will be rather fine, but for the most part, it ought to be reasonably clear in which category an action falls. The fact that the action is based on insolvency specific law is not sufficient; one must also consider if the action could alternatively be based on general law. The fact that the insolvency office holder is a litigant is insufficient; one needs to examine if the action relates his conduct or the internal management of the insolvency process, or merely pre-insolvency rights which the liquidator is asserting by virtue of stepping into the debtor's shoes. The fact that the action would not have existed but for the insolvency is not sufficient; one must consider if the aim of the proceedings is to enhance the collective enforcement regime of insolvency.

Of course, the authorities on the EU Regulations are inevitably shadowed by concerns over the smooth operation of the internal market. However, there is nothing in the principles identified above which

[66] The fact that the liquidator is not involved in the proceedings also affected the decision in *Oakley v Ultra Vehicle Design Ltd (in liquidation)* [2005] EWHC 872 (Ch); [2005] IL Pr 55.

[67] See also the parallel treatment of the assignment of a consumer claim to a non-consumer under Chapter II, Section 4 of the Brussels I Regulation: *Shearson Lehman Hutton v TVB (Case C-89/91)* [1993] ECR I-139.

suggests that they are unsuited to being transported into the common law.[68] Thus, it is suggested that it is possible to differentiate between judgments for which insolvency is the principal subject-matter, and "other" judgments. Even if the argument that judgments in insolvency proceedings deserve their own special recognition and enforcement rules may fail, the argument ought not to fail for lack of a sufficient delineation between this category of judgments and others.

(ii) What recognition and enforcement rules ought to apply for judgments in insolvency proceedings?

Having established that it would be possible as a practical matter to differentiate between judgments in insolvency proceedings and "other" proceedings, the next issue is to examine what would be appropriate rules to apply to the former. In view of the weighty opposition to any change in the orthodox principles, it seems fairly obvious that only a rule which is clear and practical to apply would have any chance of persuading naysayers to the other side.

Lord Clarke, who dissented on the common law point in *Rubin*, suggested that an avoidance order made by a foreign court in the country in which the principal liquidation is taking place ought to be enforced by an English court where to do so was consistent with justice and UK public policy. The circumstances in which the foreign court would be recognised as having jurisdiction to hand down the judgment and the factors which would render the judgment unenforceable according to justice and public policy were matters to be worked out on a case by case basis.[69] This open-textured approach, however, would engender too much uncertainty.

Other approaches include recognising judgments of a foreign court which has exercised jurisdiction in circumstances which the English court would have been prepared to exercised jurisdiction itself. This approach, based on the ideas of reciprocity and comity, was adopted in relation to a judgment *in rem*

[68] Lord Collins thought that the distinctions developed at EU law could be adapted to other contexts: *Rubin* [2013] 1 AC 236, [100].

[69] [2013] 1 AC 236, [200-201].

in a matrimonial matter.[70] It has been rejected in relation to *in personam* judgments; it was held that to do so would not be in line with the doctrine of obligation which underlie the recognition and enforcement rules.[71] Of course, referring to traditional lines of thinking on the recognition of foreign judgments rather defeats the purpose of considering whether a bold new approach is warranted. So, more to the point, while comity definitely underlies why a change in approach ought to be adopted in this area, it is on the whole a rather slippery concept which does little to inform us of the tangible rules that ought to be applied.[72] Adopting reciprocity as a touchstone is also not recommended; as will be seen below,[73] the circumstances in which the English courts assume jurisdiction in insolvency matters are outmoded.

The Canadian courts have gone furthest in modernising the common law recognition and enforcement rules. In *Morguard v De Savoye*,[74] the Supreme Court of Canada added an additional ground to the traditional bases for recognising a judgment from a sister province in Canada, *ie*, that there is a "real and substantial connection"[75] between the action and the judgment granting forum. Although the reasoning in *Morguard* emphasised the need for more generous acceptance of judgments of courts of provinces within the same federation, the "real and substantial connection" test was extended to foreign court judgments in *Beals v Saldanha*.[76] It has since been used in Ontario to grant recognition

[70] *Travers v Holley* [1953] P 246, 257.

[71] *Schibsby v Westenholz* (1870-71) LR 6 QB 155. See also *Rubin* [2013] 1 AC 236, [126].

[72] Cf In a corporate insolvency case, comity was rejected as insufficient as a basis for altering the traditional rules on recognition and enforcement of foreign judgments in *Re Trepca Mines Ltd* [1960] 1 WLR 1273.

[73] See *infra*, text to fn 80 to 86.

[74] [1990] 3 RCS 1077.

[75] A test that was applied to the recognition of foreign divorce decrees in *Indyka v Indyka* [1969] 1 AC 33.

[76] [2003] 3 SCR 416.

and enforcement of an English court sanctioned solvent scheme of arrangement for an English incorporated company.[77]

In an insolvency context, should the "real and substantial connection" be between the foreign court and the original transaction? Or should the link be to the insolvency, which may transpire much later? Even if a satisfactory choice could be made between the two, there then arises the further question of just how real and substantial the connection needs to be. The malleability of the test means that ultimately, everything would depend on the nature of each case.[78] It has been unsurprisingly rejected by the Irish Supreme Court.[79] If special rules for judgments in insolvency proceedings are required, it is suggested that it would be far better to adopt a more concrete rule. The problem is of course identifying an appropriate concrete touchstone.

As far as the bankruptcy of individuals is concerned, the English courts will recognise bankruptcy proceedings conducted in the country in which the debtor was domiciled at the time the bankruptcy petition is presented.[80] The determination of a person's domicile is however subject to rather archaic rules developed mainly to deal with family and tax matters.[81] The common law has traditionally embraced the place of incorporation as being the focal point as far as companies are concerned. The place of incorporation indicates where a company is domiciled[82] and the law of the place of

[77] *Re Cavell Insurance Co* (2006) 269 DLR (4th) 679 (Ontario Court of Appeal).

[78] J Blom and E Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 *UBC L Rev* 373, 410.

[79] *In re Flightlease* [2012] 1 IR 722.

[80] *Re Blithman* (1866) LR 2 Eq 23.

[81] See J Hill and A Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts*, 4th edn (Hart, Oxford, 2010), [18.1.3].

[82] *Gasque v Commissioners of Inland Revenue* [1940] 2 KB 80.

incorporation governs the formation, existence and dissolution of a company.[83] The English courts will recognise the dissolution of a company under the law of the place of its incorporation.[84] There is therefore a strong argument to be made that the courts of the place of incorporation of a company should provide the main forum for the insolvency proceedings. However, the place of incorporation may be a "sham" location with no real connection with a company's operations. Many companies nowadays choose where to incorporate on the basis of tax friendly laws and have their assets and carry out their main day to day operations in other jurisdictions.[85] Persons who deal with such a corporation may be unaware of where it is incorporated, much less that the law of the place of incorporation will determine how the insolvency of the company will be managed.[86]

The more modern approach is to adopt the concept of the "centre of main interests" (COMI). Both the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency adopt the COMI concept. One advantage of the COMI concept is that it can be used equally for both individuals and companies. Further, it ought to be more objectively identifiable by persons who deal with the company. Recital 13 of the EU Insolvency Regulation states that the COMI ought to be the place where

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[83] *Bateman v Service* (1881) 6 App Cas 386; *National Bank of Greece and Athens SA v Metliss* [1958] AC 509; *Carl Zeiss Stiftung v Rayner & Keller (No 2)* [1967] 1 AC 853, 972.

[84] *Lazard Bros v Midland Bank Ltd* [1933] AC 289, 297; *Dairen Kisen Kabushiki Kaisa v Shiang Kee* [1941] AC 373; *National Bank of Greece and Athens SA v Metliss* [1958] AC 509; *Bank of Ethiopia v National Bank of Egypt* [1937] 1 Ch 513, 524.

[85] Eg, BCCI was incorporated in Luxembourg and only had a brassplate office there. Its centre of operations was initially London, later Abu Dhabi. Its assets were spread worldwide. See LM Lopucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach" (1998-1999) 84 *Cornell L Rev* 696, 714.

[86] "It was said that everybody who deals with a corporation has notice of its origin and constitution, and contracts with it subject to all the incidents which according to the law of its constitution may affect its liability upon its contracts. This argument is specious…": *New Zealand Loan and Mercantile Agency Company v Morrison* [1898] AC 349, 359.

the debtor regularly conducts the administration of his interests and is ascertainable by third parties.[87] However, the COMI concept is inherently malleable. The EU Insolvency Regulation and UNCITRAL Model Law have sought to deal with this by adding the presumption that for a company, the place of the registered office shall be presumed to provide its COMI.[88] The UNCITRAL Model Law also provides that the habitual residence of an individual is presumed to be his COMI.[89] This of course does not quite resolve the issue as there would be the further question of in what circumstances the presumption can be rebutted. What if a company conducts its economic activities in one jurisdiction, but has its management office in another?[90] What if a debtor acts strategically to relocate his COMI to another country in anticipation of imminent insolvency proceedings being commenced?[91] What if more than one court is convinced that it provides the COMI of the debtor?[92] All these problems are compounded in cases where there is no over-arching judicial body to decide between differing interpretations by national courts.[93]

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[87] See further, *Eurofood IFSC Ltd (Case C 341/04)* [2006] ECR I-3813; *Interedil Srl, in liquidation v Fallimento Interedil Srl (Case C-396/09)* [2012] BCC 851.

[88] Insolvency Regulation, Art 3(1); UNCITRAL Model Law, Art 16(3).

[89] Art 16(3).

[90] J Garašić, "What is Right and What is Wrong in the ECJ's Judgment on *Eurofood IFSC Ltd*" (2006) 8 *Yearbook of PIL* 87, 93.

[91] Eg, *Re Hellas Telecommunications (Luxembourg) II SCA v* [2009] EWHC 3199 (Ch); [2010] BCC 295; *Hans Brochier Holdings Ltd v Exner* [2006] EWHC 2594 (Ch); [2007] BCC 127. The argument that a debtor ought to be estopped from relying on such a strategic move under the EU Insolvency Regulation (suggested by I Fletcher in G Moss, *et al*, *The EC Regulation on Insolvency Proceedings*, 2nd edn(Oxford, OUP, 2009), [8.144]) was rejected in *Re Office Metro Ltd* [2012] EWHC 1191 (Ch); [2012] BCC 829; [26].

[92] Eg, *Eurofood IFSC (Case C-341/04)* [2006] ECR I-3813.

[93] UK, US and Canadian courts have applied different interpretations of COMI in relation to the UNCITRAL Model Law: B Wessels, "COMI: Past, Present and Future" (2011) 24 *Insolv Int* 17.

Be that as it may, it is suggested that between the place of incorporation and the COMI as the location where the principal insolvency proceedings are carried out and to whose court's judgments recognition should be given, the latter is preferable.[94] This is so although not all cases of "abusive" forum shopping can be avoided[95] and there will inevitably be cases where a debtor's COMI is unclear.[96] Any flexible principle will always attract the argument of uncertainty; some uncertainty is the price that must be paid for preferring flexibility over rigidity. It is submitted that COMI would better reflect creditor expectations and offer a more tangible connection with the debtor as compared to the place of incorporation. In addition, there is an ever increasing wealth of case law aimed at clarifying the COMI concept for the EU Insolvency Regulation and the UNCITRAL Model Law. Further, both the EU[97] and UNCITRAL[98] are currently undergoing efforts to reform and update both instruments; these

[94] Lord Hoffmann in *In re HIH* thought that the concept of COMI may be more appropriate than the traditional common law concepts: [2008] 1 WLR 862, [31].

[95] There is a distinction between "good" and "bad" forum shopping. The former will benefit creditors; the latter will disadvantage creditors. See Advocate General Colomer in *Seagon v Deko Marty Belgium NV (Case C-339/07)* [2009] ECR I-767, [60], n 49; European Commission, *Commission Staff Working Document Executive Summary of the Impact Assessment accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings*, SWD (2012) 417 final, 5.

[96] Notably, no real solution has been found for group insolvencies, although the Commission Proposal on the reform of the EU Insolvency Regulation attempts one: *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings*, COM (2012) 744 final.

[97] *Ibid.*

[98] UNCITRAL has adopted revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency in July 2013. The final version of the text will be made available at: http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

efforts include refining the concept of COMI. It is apparent from the UNICTRAL Guide to Enactment[99] and Official Records of the UN General Assembly[100] that the concept of COMI under the UNCITRAL Model Law is intended to bear a similar meaning to that under the EU Insolvency Regulation. In *In re Stanford International Bank Ltd*,[101] the Court of Appeal held that it was permissible for the court to refer to ECJ interpretations of COMI for the purposes of the EU Insolvency Regulation when dealing with the Cross-Border Insolvency Regulations 2006.[102] The US courts have also done so for the purposes of Chapter 15 of the US Bankruptcy Code[103] which enacts the US version of the UNCITRAL Model Law into US law.[104] There is no strong reason why developments on interpreting COMI by the EU and UNCITRAL and the case law on the two international insolvency instruments from these institutions cannot be tapped on for the purposes of applying the COMI concept at common law. It is fair to say that the legal objectives at common law, under the EU Regulation and under the UNCITRAL Model Law may not be fully aligned but at the end of the day, one is dealing with the same concept (*ie*, COMI) adopted in the same context (*ie*, a cross-border insolvency).

Therefore, it is submitted that an appropriate recognition and enforcement rule for judgments in insolvency proceedings is this: a foreign court ought to be considered to have international jurisdiction at common law when the debtor has its COMI within that court's jurisdiction.

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[99] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, [31] (available at http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf).

[100] General Assembly Official Records, 52nd Session, Supplement No 17, [153].

[101] [2010] EWCA Civ 137; [2011] Ch 33.

[102] [2011] Ch 33, [53-54].

[103] USC Title 11, Chap 15.

[104] Eg, *In re SPhinX Ltd* 351 BR 103, 118 (Bkrtcy SDNY, 2006) (aff'd 371 BR 10, 18; SDNY, 2007); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 389 BR 325 (SDNY, 2008); *In re Fairfield Sentry Ltd* 714 F.3d 127 (CA2 (NY), 2013).

(iii) Defences

The suggested scheme bears a close parallel to the EU Insolvency Regulation's framework. Under the Regulation, the court of a EU Member State in which the debtor has its COMI has jurisdiction to open main insolvency proceedings[105] and judgments handed down by that court, subject to a public policy defence,[106] would automatically be recognised in other EU Member States.[107]

However, the principle of automatic recognition adopted under the Regulation would be inappropriate at common law. Further, the principle of mutual trust underpins the recognition provisions in the Regulation.[108] This means that once main insolvency proceedings have been opened in one Member State, the courts of other Member States must recognise that decision without being able to review the basis on which the first court assumed jurisdiction.[109] In other words, the enforcing courts are unable to assess anew whether the first court truly provides the location of the debtor's COMI.

A court at common law should not be so constrained. First, it ought to be free to examine for itself whether the judgment granting court provides the location of the debtor's COMI. If the conclusion is that the debtor's COMI lies elsewhere, the judgment is not entitled to recognition barring satisfaction of one of the other traditional bases of recognition. Secondly, a judgment debtor in a case decided outside the EU framework and mutual trust principle would require greater protection than having a sole defence of public policy. Apart from public policy, the other traditional defences available for *in*

[105] Art 3.

[106] Art 26. See however, the proposed Art 25 in the European Commission's proposal for the reform of the Insolvency Regulation, which makes available all the defences available under the Brussels I Regulation, bar one: COM (2012) 744 final, 26

[107] Art 25.

[108] Recital 22. See also *Eurofood IFSC (Case C-341/02)* [2006] ECR I-3813, [39-42].

[109] *Ibid*, [42].

personam judgments at common law[110] are that the foreign judgment is impeachable for fraud and breach of natural justice. All these ought to be available as defences. In fact, it is arguable that the defences of public policy, fraud and breach of natural justice should be calibrated to take into account the fact that the court will be enforcing default judgments where the defendant was not there to put forward his case. In *Beals v Saldanha*, Lebel J acknowledged that the widening of the circumstances in which a foreign court is held to have international jurisdiction must be accompanied by a reformulation of the defences to recognition. This is to ensure "an appropriate recalibration of the balance between respect for the finality of foreign judgments and protection of the rights of Canadian defendants."[111] Thirdly, new defences may require to be developed. Liquidators are sometimes wont to act rather aggressively, pursuing unfounded claims[112] or springing claims with little notice on unsuspecting defendants. In such circumstances, defendants would require protection over and above that offered by the traditional defences. It has been suggested that additional defences could include that it was practical and not unreasonable for the judgment creditor to have defended the claim and that the law on liability to repay, limitation periods and defences for repayment under the *lex concursus* is analogous to English law.[113]

D. Should different recognition and enforcement rules apply to judgments in insolvency proceedings?

It has been argued above that if judgments in insolvency proceedings deserve special treatment, it would be possible to formulate workable and appropriate recognition and enforcement rules. Just

[110] It is unclear whether the same defences apply for judgments *in rem*.

[111] [2003] 3 RCS 416, 507.

[112] See, eg, *Madoff Securities International v Raven* [2013] EWHC 3147 (Comm), [469].

[113] A Briggs, "*Rubin* and *New Cap*: Foreign Judgments and Insolvency", 24-25, Jones Day Professorship of Commercial Law Lecture, 10th April 2013, Singapore Management University (available at: http://law.smu.edu.sg/sites/default/files/law/photos/JD2013/full_paper.pdf).

because something can be done, however, does not necessarily mean that it ought to be done. The aim of this section is to consider whether different rules *ought* to apply.

(i) Universalism and its limits

The primary driver for treating judgments in insolvency proceedings differently is the contemporary push for the adoption of universalism in cross-border insolvencies. The Court of Appeal in *Rubin v Eurofinance*[114] was persuaded that universalism[115] meant that the English court ought to actively assist the court where the principal insolvency proceedings were being carried out; this included subjugating the normal rules of recognition and enforcement of foreign judgments as far as judgments in insolvency proceedings were concerned.[116] Of course, the Supreme Court in *Rubin v Eurofinance*[117] decided that universalism did not extend quite so far.

The central concept of universalism is that one court would be the main centre for insolvency proceedings that will apply to all the debtor's assets and creditors wherever located. Pure universalism sounds in the doctrine of unity, which dictates that only one court would have jurisdiction to open insolvency proceedings and that this court's orders would be enforced by other countries.[118] The converse doctrines are the doctrines of territoriality and plurality. The doctrine of territoriality permits

[114] [2011] Ch 133.

[115] Or rather, "modified" universalism.

[116] *Cf Schmid v Hertel (Case C-328/12)* (16th Jan 2014), where the ECJ ruled that the Insolvency Regulation gave a Member State court, which was the location of the debtor's COMI, jurisdiction to hear proceedings against a defendant in circumstances where the Member State court did not have jurisdiction under its normal national rules on jurisdiction.

[117] [2013] 1 AC 236.

[118] LoPucki (1998-1999) 84 *Cornell L Rev* 696, 705.

the opening of insolvency proceedings in any jurisdiction in which the debtor has assets. The proceedings are restricted to assets within that particular jurisdiction and local creditors. The doctrine of plurality supports territorialism in that it accepts that there may be as many proceedings as jurisdictions in which the debtor has assets.[119]

The argument on which of the competing doctrines is more appropriate to tackle cross-border insolvency is outside the scope of this article. However, the majority of insolvency specialists clearly advocate universalism as the panacea for problems arising in insolvencies with an international dimension. Universalism is said to be the more efficient regime. It is argued that costs would be kept down as fewer insolvency proceedings would be opened; larger proceeds can be realised from an integrated sale of assets spread out in more than one country; there would be fairer distribution among creditors as all will be subject to the same rules; and the reorganisation of an insolvent business would have a greater chance of success as one administrator would have oversight over everything.[120] At a more macro level, it is argued that creditors can more easily calculate the risks of doing business with a particular entity as they would know which country's set of rules would apply. This would lead to a reduction in the costs of borrowing and an increased flow of trade.[121]

Each country's approach on how to deal with insolvency involves a careful calibration of its social, economic and public policies. Adopting the pure form of universalism, that is, unity, would essentially

[119] Another doctrine, contractualism, is not as established. For further details on contractualism, see K Rasmussen, "A New Approach to Transnational Insolvencies" (1997-1998) 19 *Michigan Journal of Int Law* 1.

[120] See generally, JL Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 *Am Bankr LJ* 457, 464-466; LoPucki (1998-1999) 84 *Cornell L Rev* 696, 706-708 (Note: Professor LoPucki prefers "modified" territorialism).

[121] Westbrook (1991) 65 *Am Bankr LJ* 457, 466. However, Professor Westbrook later preferred a more cautious stance on this point: JL Westbrook, "A Global Solution to Multinational Default" (1999-2000) 98 *Mich L Rev* 2276, 2326.

allow a foreign state's policies to trump a state's own policies in these areas.[122] That is why unity is not considered by most to be a serious contender as far as the different approaches one could take in dealing with cross-border insolvencies go.[123] It is not politically feasible, unless insolvency rules on, for example, priority, were viewed as the equivalent of non-tariff barriers on trade.[124] Lord Hoffmann has conceded that full universalism can only be achieved by international treaty.[125] Advocates of universalism have settled for the more attenuated principle of "modified" universalism instead. The EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency could be seen as examples of international instruments which adopt a modified universalism framework.[126]

At common law, Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd*[127] described modified universalism as the:

"golden thread running through English cross-border insolvency cases since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."[128]

The difference between pure universalism and modified universalism is this: under the latter principle, courts are encouraged to assist and co-operate with the home court, by, for example, remitting assets within its control to the home court, but, crucially, each court retains discretion to refuse co-operation.

[122] On which point, see *infra*, section D(ii).

[123] Cf Westbrook (1999-2000) 98 *Michigan L Rev* 2276.

[124] Hon JJ Spigelman, "Cross-border insolvency: Co-operation or Conflict?" (2009) 83 *ALJ* 44, 53.

[125] *In re HIH* [2008] 1 WLR 852, [7].

[126] See also Insolvency Act 1986, s 426.

[127] [2008] 1 WLR 852.

[128] [2008] 1 WLR 852, [30].

This difference has led one commentator to argue that modified universalism "sacrifices nearly all of the supposed advantages of universalism."[129]

This is a fair comment as the element of discretion robs the principle of modified universalism of much of its power. Lord Hoffmann did not articulate in what sort of circumstances "justice and UK public policy" would entitle the English courts to refuse to co-operate with the courts handling the main insolvency proceedings. From the case law it is clear that a similarity in the laws of England and the law under which the principal insolvency proceedings are being administered is important. However, the odds of this can be low as each country would have different economic, social and public agendas. In *In re HIH*, a majority of the House of Lords would have refused remittal of English assets to New South Wales to be distributed in the principal liquidation but for the fact that Australia was designated as a "relevant country" under the statutory scheme of judicial assistance set out in section 426 of the Insolvency Act 1986.[130] There was discomfort with the fact that Australian distribution rules would have led to a different result compared to under English law. In *Re Bank of Credit and Commerce International SA (No 10)*,[131] while the English court was prepared to recognise that the English liquidation was ancillary to the principal liquidation taking place in Luxembourg, the English proceeds were first used to satisfy claims under English law which would not have arisen under the law of Luxembourg. Only then was the net balance transmitted to Luxembourg. Scott V-C remarked that the ancillary character of the English proceedings did not relieve the court of the obligation to apply English insolvency law.[132] The courts also prefer similarity of laws in other aspects of judicial co-

[129] LoPucki (1998-1999) 84 *Cornell L Rev* 696, 728.

[130] Lord Scott, Lord Neuberger and Lord Phillips. Lord Hoffmann, with whom Lord Walker agreed, held that the English court had an inherent jurisdiction at common law to direct the remittal of the English assets to New South Wales.

[131] [1997] Ch 213.

[132] [1997] Ch 213, 246.

operation. The Privy Council in *Cambridge Gas* was doubtful if assistance could include the application of foreign insolvency law which has no equivalent in domestic law.[133] Other jurisdictions, such as the United States, also take the same stance.[134] Courts are usually careful to avoid giving the perception that they are applying foreign insolvency laws. Even Lord Hoffmann in *In re HIH* felt compelled to state that in his opinion, the court by directing remittal of assets to Australia were merely applying English insolvency law and not Australian law; Australian law would be applied by the Australian courts and liquidators in Australia.[135]

It should be borne in mind that universalism developed during the 18th and 19th century when the doctrine benefited Britain as an imperial power.[136] There is still a sense that a universalist approach would more often favour the mature economic power states who would more likely provide the base for debtors (thereby giving those courts jurisdiction to conduct the principal insolvency proceedings) and creditors (thereby giving its creditors access to assets in other countries). These states would also benefit from the high professional fees that would likely be generated by international insolvencies, especially that of multi-national companies, which would be predominantly paid to insolvency professionals operating in those states.[137]

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[133] [2007] 1 AC 508, [22].

[134] LoPucki (1998-1999) 84 *Cornell L Rev* 696, 729-730.

[135] [2008] 1 WLR 852, [26]. His Lordship made this remark although the Insolvency Act 1986, s 426(5) permits an English court to apply the law of a foreign country where that foreign country is a "designated country" (as is Australia) and the foreign court has made a request for judicial assistance pursuant to s 426. Cf *England v Smith* [2001] 1 Ch 419. See also *PricewaterhouseCoopers v Saad Investments* [2013] CA (BDA) 7 Civ (Court of Appeal for Bermuda).

[136] *Cambridge Gas* [2007] 1 AC 508, [17].

[137] For example, the liquidators of the BCCI earned US$200 million in fees: LoPucki (1998-1999) 84 *Cornell L Rev* 696, 713 (fn 87).

Further, universalism suffers from other flaws. The advantages of universalism will be maximised only if it is embraced by all states.[138] This is clearly not the case. Even the member states of the EU, with their integrated economic and political systems, were unable to agree on a full universalist system[139] and, on one view, the EU Insolvency Regulation could be seen to tip more towards territorialism than universalism.[140] A universalist state "loses out" when it remits assets to a territorialist state for distribution there. In addition, the perception of universalism's advantages may be inflated. While pure universalism, with its anointment of one and only one insolvency proceedings, would certainly drive down costs, modified universalism could result in as many insolvency proceedings as countries in which the debtor has assets.[141] The ancillary courts would have to assess, after taking into account foreign law, whether it would be more appropriate to remit assets to the courts of the country in which the principal proceedings are taking place or to disburse local assets according to local rules. There would also be costs involved in remitting assets abroad, if it is decided that this would be the more appropriate option. Even the notion of fairness amongst creditors worldwide, a chief selling point of universalism, can be doubted as countries committed to the principle of equality of distribution would still have carved out a list of exceptions to the principle.[142]

It is not refuted that the efficient management of cross-border insolvencies would require some form of judicial co-operation. In that, universalism or modified universalism may well make some sense as a guiding principle when it comes to the distribution of the debtor's assets and the settling of creditors'

[138] G McCormack, "Universalism in Insolvency Proceedings and the Common Law" (2012) 32 *OJLS* 325, 328.

[139] F Tung, "Is International Bankruptcy Possible?" (2001-2002) 31 *Mich J Int'l L* 31, 100.

[140] *Ibid*, 77.

[141] LoPucki (1998-1999) 84 *Cornell L Rev* 696, 729.

[142] This is acknowledged by no less than Professor Westbrook (1991) 65 *Am Bankr LJ* 457, 466.

claims.[143] However, there are limits to judicial assistance. Universalism has not been considered sufficient to gloss over differences between English and foreign insolvency laws, or to provide enough justification where assistance risks unfairness to one of the parties.[144] It should not be forgotten that one is dealing with the enforcement of default judgments handed down against absent defendants. While some defendants may be thought to be cannily manipulating the legal rules,[145] there will be other defendants who can ill-afford to appear in foreign proceedings and face a genuine dilemma of whether to incur the expense of defending themselves or risk the default judgment being enforced against them.[146] This fact, coupled with the principle's limitations, means that universalism or modified universalism provides a rather slender frame on which to advocate a drastic change to the private international law rules on recognition and enforcement of foreign judgments.

(ii) Judicial "legislation" and the nature of insolvency law

A common refrain amongst judges who have preferred a more cautious approach in cross-border insolvencies is that any changes in the law ought to be achieved by legislative means rather than through the development of the common law. The courts tend to deny any inherent common law power on issues which have been the subject of legislation for fear of usurping Parliament's intention.[147] One might have thought that the area of common law rules on the recognition and enforcement of foreign judgments would be immune from such a concern, but, barring the Canadian

[143] R Laville and S Shivji, "Cross-border Transaction Avoidance: *Rubin v Eurofinance SA"* (2010) 23 *Insolv Int* 149, 153.

[144] See *supra*, text to fn 130 to 135. See also *Re T & N Ltd* [2004] EWHC 2878 (Ch); [2005] BCC 982.

[145] Eg, the defendants in *Rubin*, who had notice of the US proceedings and sought legal advice.

[146] *Rubin* [2013] 1 AC 236, [130].

[147] *In re HIH* [2008] 1 WLR 852, [61], [76]; *Al-Sabah v Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333, [35]; *PricewaterhouseCoopers v Saad Investments* [2013] CA (BDA) 7 Civ (Court of Appeal for Bermuda). Cf *Schmitt v Dechmann* [2012] EWHC 62 (Ch); [2013] Ch 61.

courts,[148] the same deference applies. Of course, where Parliament has legislated, the common law must give way. But in instances where Parliament has not legislated, it may seem unduly restrictive for the common law to have to remain in an arrested state. All the more so in relation to a rule, developed in a different world with tighter borders, which relates to the fast developing area of cross-border insolvency.[149] Nevertheless, Lord Collins in *Rubin* thought that any change in the traditional common law rules on recognition and enforcement of foreign judgments to be a matter for the legislature and not judicial innovation.[150] Similar sentiments were expressed by the Irish Supreme Court in *In re Flightlease (Ireland) Ltd*.[151]

That said, the courts have led the way in respect of some of the important developments in cross-border insolvencies. For example, the doctrine of ancillary liquidation is a creature of common law.[152] Courts have been prepared to render assistance to each other in cross-border insolvency matters even before the enactment of formal co-operation mechanisms. There is also now a stronger sense of "international collegiality" amongst, at least, the common law judges.[153]

[148] *Morguard Investments v De Savoye* [1990] 3 RCS 1077; *Beals v Saldanha* [2003] 3 SCR 416.

[149] *In re Flightlease* [2012] 1 IR 722, [4] *per* O'Donnell J.

[150] *Rubin* [2013] 1 AC 236, [129]. The House of Lords evinced a similar deference to Parliament in relation to the defence of fraud to the enforcement of foreign judgments in *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489. Cf Lord Clarke in *Rubin* who thought that any development on the courts' part would be a principled one: [2013] 1 AC 236, [199].

[151] [2012] 1 IR 722.

[152] *Re Matheson Brothers Ltd* (1884) 27 ChD 225; *Re Commercial Bank of South Australia* (1886) 33 ChD 174; *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.

[153] Spigelman (2009) 83 *ALJ* 55, 51.

One concern flagged in *Flightlease* was that *Dicey*'s Rule 43[154] had become so entrenched that any change from it would cause injustice as the change would have retrospective effect.[155] However, this is part and parcel of the fluid nature of the common law- any development, however incremental, of the common law will no doubt cause some unforeseen consequences. In addition, there is some flexibility in the doctrine of retrospective effect of the common law.[156]

A more valid concern stems from the particular nature of insolvency law. As mentioned above, insolvency law touches on many areas- economic, social and public policies- which might properly be thought to be Parliament's domain. Each country's insolvency regime reflects its choices on the appropriate goals of its insolvency system and its political framework. For example, priority rules reflect legislative choices of who ought to be accorded preferential treatment and how the risks of insolvency ought to be allocated. It is therefore no surprise that the *lex concursus* provides the choice of law rule for insolvency proceedings[157] and that insolvency law is one of the few areas where routine application of the *lex fori* is not generally viewed as being excessively parochial.[158] In view of this, recognising and enforcing judgments in insolvency proceedings is tantamount to allowing a foreign

[154] *Dicey, Morris and Collins*, [14R-054].

[155] Cf O'Donnell J, in his separate judgment in *In re Flightlease* [2012] 1 IR 722, who was particularly concerned about an untoward fossilisation of the common law.

[156] *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88, [36]-[38]; *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601, [50], [101].

[157] *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385, 394; *Re Suidair International Airways Ltd* [1951] Ch 165, 172-173.

[158] Foreign law would be applied to incidental matters; eg, whether a debt is valid according to its governing law (Rome I Regulation on the law applicable to contractual obligations, Article 12(1)(d) (Reg (EC) 593/2008, [2008] OJ L 177/6)), or whether the officers of a company have been validly appointed according to the law of the place of incorporation (*Banco de Bilbao v Sancha* [1938] 2 KB 176).

state's approach to sensitive policy issues prevail in the forum.[159] The traditional rules on recognition and enforcement of foreign judgments at least curtail unbidden importation of foreign laws and policies by the courts.

In addition, insolvency law prevails over other types of laws- it overrides contractual, property and other legal rights that exist outside of the insolvency.[160] The special nature of insolvency law is also demonstrated by the fact that nearly all federated countries, which generally confer autonomy to its constituent states in commercial matters, adopt national systems of insolvency law.[161] Insolvency proceedings are therefore different from a generic civil suit between private parties. While the latter determines rights and obligations as between the private litigants, the former would touch on every legal relationship between the debtor and its creditors and other interested parties.[162] Given its wider impact and import, it does not make sense to apply more generous rules on recognition and enforcement of foreign judgments to insolvency proceedings compared to simple civil claims.

Thus, it is submitted that any change in the common law rules on recognition and enforcement of foreign judgments in respect of insolvency judgments involves much more than merely the common law itself; national interests are at stake. The courts are right to be concerned that they would indirectly affect issues which are properly the responsibility of Parliament.

(iii) Amelioration of the doctrine of "obligation"

The doctrine of obligation underlies the common law recognition and enforcement of foreign judgment rules. It is said that a judgment debtor, through his presence in the foreign jurisdiction at the time suit is commenced, or by his submission to the foreign court, obliged himself to obey the

[159] Tung (2001-2002) 23 *Mich J Int'l L* 31, 49, 52; LoPucki, (1998-1999) 84 *Cornell L Rev* 696, 709-713.

[160] Tung (2001-2002) 23 *Mich J Int'l L* 31, 47.

[161] Westbrook (1999-2000) 98 *Mich L Rev* 2276, 2284.

[162] Tung (2001-2002) 23 *Mich J Int'l L* 31, 47.

judgment of a foreign court of competent jurisdiction.[163] The doctrine of obligation justifies why even a default judgment, which at first sight may be thought to be unfair as the defendant is not before the foreign court to defend himself, is entitled to recognition at common law.

To adopt more generous rules on recognition and enforcement for judgments in insolvency proceedings would be to undermine the doctrine of obligation severely. A defendant whose only vice was to transact with an entity can hardly be said, without doing more, to have obliged himself to obey judgments stemming from that entity's domicile, place of incorporation, or COMI (whichever the most appropriate touchstone is adjudged to be) even if he had been aware of that particular location. This principle does not change merely because that entity later becomes insolvent.

If the common law were to adopt new rules for judgments in insolvency proceedings, the focus would no longer be on whether the judgment debtor has obliged himself, but whether the recognising court should impose an obligation on him.[164] This would be, as has been said of the Canadian extension, a "fundamental reorientation of the law on foreign judgments". [165] Universalism may be thought by some to provide the justification for such a reorientation, but it has been argued above that it does not.

(iv) Conclusion

[163] *Williams v Jones* (1845) 13 M & W 628, 633; *Godard v Gray* (1870-71) LR 6 QB 139, 147; *Schibsby v Westenholz* (1870-71) LR 6 QB 155, 159.

[164] A Briggs, *The Conflict of Laws*, 3rd edn (OUP, Oxford, 2013), 177.

[165] *Ibid.* That said, Professor Briggs applauds the Court of Appeal, rather than Supreme Court, decision in *Rubin v Eurofinance*: see "*Rubin* and *New Cap*: Foreign Judgments and Insolvency", Jones Day Professorship of Commercial Law Lecture, 10th April 2013.

One may agree with the general sentiment, articulated by the Canadian Supreme Court in *Morguard*[166] and *Beals*,[167] that the common law ought to be free to adapt to accommodate modern times, with the easy flow of "wealth, skills and people"[168] across borders. However, the interposition of insolvency in *Rubin* throws into sharp relief the division of responsibilities between the courts and Parliament, and highlights the areas in which a court ought not venture. Further, this author is not convinced that the principle of universalism or modified universalism provides a sufficiently strong basis for the overturning of established private international law rules. Therefore, the conclusion reached is that the majority of the Supreme Court in *Rubin v Eurofinance* was right to refuse to ignore the traditional rules on recognition and enforcement with respect to judgments in insolvency proceedings. Any change in this area is, as argued above, more appropriate for Parliament rather than the common law as it involves issues beyond the purview of the courts.

In view of this conclusion, it might be noted that considering the question of whether new rules ought to be adopted first would render the prior section on whether workable rules could be formulated otiose and thus make for a much shorter article. However, this author is mindful that one person's "radical change" is another person's "incremental development".[169] The objective of considering the issues in the order above was to demonstrate that should the climate favour change over orthodoxy, the appropriate rules which ought to be adopted are as set out in section C.

E. Submission and *New Cap*

[166] *Morguard Investments v De Savoye* [1990] 3 RCS 1077.

[167] *Beals v Saldanha* [2003] 3 SCR 416.

[168] *Morguard Investments v De Savoye* [1990] 3 RCS 1077, 1098 *per* La Forest J.

[169] See, eg, Lord Collins cf Lord Clarke in *Rubin.*

The Supreme Court's decision in *Rubin v Eurofinance*[170] supports the orthodox position in insisting that foreign judgments rendered in insolvency proceedings must fulfill the normal rules of recognition and enforcement of foreign judgments. However, what the Supreme Court took away with one hand in *Rubin*, it unexpectedly gave with the other hand in the *New Cap* appeal. It might be recalled that in *New Cap* the court held that the New South Wales judgment was entitled to enforcement because the Syndicate, by proving in the New South Wales insolvency proceedings and taking part in creditors' meetings, had submitted to the jurisdiction of the New South Wales court. This was an unexpected broadening of the concept of submission for the purposes of conferring jurisdiction on the foreign court. Normally, the concept of submission is confined to the taking of some step before the foreign court which is only necessary or useful if one has waived one's objection to the court's jurisdiction,[171] appearing as a claimant or counter-claimant before the foreign court,[172] or submitting through a contractual choice of court agreement.[173]

The objective of this section is to consider the ruling in *New Cap* and whether the broadened interpretation of "submission" adopted by the Supreme Court is warranted. First though, the limits of *New Cap* ought to be noted. It has been held that Lord Collins did not lay down any wide rule of law that proving in a foreign insolvency means that the creditor has submitted to the jurisdiction of the

[170] [2013] 1 AC 236.

[171] *Williams & Glyn's Bank v Astro Dinamico* [1984] 1 WLR 438, 444 (a case on whether the defendant had submitted to the English court's jurisdiction); applied to a foreign judgment in *Akai Pty Ltd v People's Insurance Co* [1998] 1 Lloyd's Rep 90. See further *Dicey, Morris and Collins*, [14-069-14-075]; Civil Jurisdiction and Judgments Act, s 33.

[172] *Schibsby v Westenholz* (1870-71) LR 6 QB 155, 161.

[173] *Feyerick v Hubbard* (1902) 71 LJKB 509. See further, *Dicey, Morris and Collins*, [14-076-14-081].

foreign court for any and all claims that may arise out of the insolvency.[174] Notwithstanding that this holding came from a case involving the exercise of the English court's jurisdiction, this must be true for the recognition and enforcement of foreign judgments too. The creditor will be held to have submitted to avoidance proceedings against itself,[175] and, it is suggested, all claims that are sufficiently connected to the insolvency in the sense of the discussion in section C(i) above. However, the creditor, by the mere act of proving, should not be considered to have submitted to the foreign court's jurisdiction in relation to claims which may operate with the insolvency in the backdrop, but which do not have the insolvency as its principal subject-matter.

(i) Arguments in favour of *New Cap*

A few points could be made in support of *New Cap*. Some of the points below may overlap and some may not withstand closer scrutiny, but an advocate for the Supreme Court's ruling could potentially make the following arguments.

First, there is an instinctive appeal to fairness in the *New Cap* ruling. A creditor expects to enjoy the fruits of proceedings which the liquidator may pursue against parties who have received the assets of the insolvent entity within a certain time period from the filing of insolvency; the creditor expects a larger dividend. It seems hardly fair to be able to cry foul when those proceedings are commenced against one's self.[176] Lord Collins recognised this by his statement that the Syndicate should not be

[174] *Erste Group Bank AG London Branch v JSC "VMZ Red October"* [2013] EWHC 2926 (Comm). See also *Isis Investments Ltd v Oscatello Investments Ltd* [2013] EWHC 7 (Ch).

[175] As in *New Cap* itself.

[176] It has been suggested that the mere lodging of proof is insufficient; a creditor has benefitted from the insolvency proceedings so as to justify the burden of being bound by the supervising court's judgment only upon payment on his proof: see M Crystal, A Cohen and A Al-Attar, "Thwarting Dissenting Creditors", 6, South Square Digest, Nov 2013 (available at: http://www.southsquare.com/wp-content/uploads/South-Square-Digest-November-2013.pdf).

able to enjoy the benefits of the insolvency proceedings without having to bear the burdens of complying with orders stemming from the same proceedings.[177] Similarly, the Court of Appeal in *Adams v Cape Industries*[178] had justified the temporary presence of the defendant as being sufficient to confer international jurisdiction on the foreign court in these terms: "So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts."[179]

Secondly, the court relied on *Ex parte Robertson, In re Morton*[180] as authority. However, *Ex parte Robertson* was not directly on point.[181] It involved the English court deciding that it had jurisdiction over a Scottish creditor, who had proved a debt and received a dividend in English insolvency proceedings, to order him to repay a sum of money to the debtor's estate. In other words, the case was on the English court's assertion of jurisdiction in an English insolvency; it did not involve the recognition and enforcement of a foreign judgment. Nonetheless, although *Ex parte Robertson* was not the best authority to rely on, threads of the reasoning in that case might have provided fodder for the Supreme Court's revisionist understanding of what "submission" means for the purpose of the recognition and enforcement of foreign judgments. Bacon CJ held that the Scottish creditor, by submitting a proof in the English insolvency proceedings:

"came in under the liquidation, and what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it- that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the Court, and the Court has

[177] [2013] 1 AC 236, [167].

[178] [1990] Ch 433.

[179] [1990] Ch 433, 519.

[180] (1875) LR 20 Eq 733.

[181] A Briggs, "In for a Penny, In for a Pound" [2013] *LMCLQ* 26, 29.

jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the Court may think necessary in order to effect complete distribution of the bankrupt's estate."[182]

On this view then, a creditor who submits proof of debt and who may take further part in creditors' meetings and the like has entered into a contract with the other creditors and the insolvency office-holders. Agreeing to the due administration of the insolvent estate also includes agreeing that the court in whichever jurisdiction proof of debt has been entered has the authority to adjudicate all claims pertaining to the insolvency, including claims that may lead to an unfavourable result to the creditor himself.[183] The court, when asked to recognise and enforce a foreign judgment against the creditor, is merely giving effect to this contract.

Thirdly, it could be argued that, on the authority of *Murthy v Sivasjothi*,[184] a creditor who submits to the jurisdiction of the foreign court to determine what payout he ought to receive from the insolvent estate thereby also submits to the court's jurisdiction in relation to other related claims.[185] Claims that are pursued by the liquidator against those who have unfairly or fraudulently received payment from the debtor before the filing of insolvency proceedings are arguably "related" claims; the dividend which a creditor will receive is after all determined by the success of these actions. In *Murthy*, the Court of Appeal emphasised that the enforcing court ought to consider whether it would be unfair to hold the defendant to have submitted to the foreign court's jurisdiction in relation to related claims.[186] It is suggested that it would not be unfair to do so, if at least some of the reasons on this list are sound.

[182] (1875) LR 20 Eq 33, 737-738.

[183] The proper law of this contract would be the *lex concursus*.

[184] [1999] 1 WLR 467.

[185] Briggs [2013] *LMCLQ* 26, 29.

[186] [1999] 1 WLR 467, 476-477.

Fourthly, there is that understanding that the rules of the game, so to speak, change upon the onset of insolvency. A creditor should not to expect the *status quo* once the entity he dealt with is insolvent; the method by which his debt will be enforced will change, his *in personam* rights are converted into proprietary rights under a trust,[187] and, possibly, submission to the supervisory court will encompass a wider slate of actions than hitherto thought. For example, one way in which *Cambridge Gas* could be justified is to argue that a shareholder of a company also submits to the jurisdiction of a foreign court when the company of which he is a member so submits.[188]

Lastly, a creditor is not obliged to submit proof; if he chooses to do so, it may not be unduly harsh to say that he just has to accept the consequences. Once a creditor chooses to participate in the insolvency process by proving, he has been co-opted into the entire process, and should not be heard to demur from those bits of the process which are adverse to his own interests.

(ii) Arguments against *New Cap*

Turning now to arguments for the other side, *ie*, that the *New Cap* ruling is unwarranted, an advocate for this position might potentially raise the following points. The same disclaimers as for the previous list apply. The first five points below seek to argue that there is no submission *per se*; the sixth to eighth points make the case that if there has been some form of submission by the creditor upon the lodging of proof, the questions of to what and to whom he has submitted must be considered carefully.

First, it is true that a creditor is not obliged to submit proof, but the practical effect of the decision is to put creditors between the devil and the deep blue sea: a creditor must lodge proof of debt if he hopes to get some sort of satisfaction in insolvency proceedings, but if he does so, he runs the risk of

[187] Under English law anyway: *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167.

[188] Briggs (2006) 77 *BYIL* 554, 579; Briggs [2013] *LMCLQ* 26; Tham [2007] *LMCLQ* 129.

being held to have submitted to adverse judgment against himself handed down by the supervising court.

Secondly, the proof of debt form[189] cannot possibly be thought to be equivalent to a writ; the two are not similar enough, in form or in substance, to warrant the same legal consequences.[190]

Thirdly, it is notable that the New South Wales court in *New Cap* did not appear to regard the Syndicate as having submitted to its jurisdiction; the court assumed jurisdiction over the Syndicate on the basis that a cause of action had arose under the Australian Corporations Act 2001.[191] While, technically, whether there has been submission to the foreign court is a question to be determined by the enforcing court's private international law rules, there is some authority to the effect that the foreign law will be relevant. In *Adams v Cape Industries*, Scott J stated:

"If the steps would not have been regarded by the domestic law of the foreign court as a submission to the jurisdiction, they ought not, in my view, to be so regarded here, notwithstanding that if they had been steps taken in an English court they might have constituted a submission. The implication of procedural steps taken in foreign proceedings must, in my view, be assessed in the context of foreign proceedings."[192]

[189] The UK version is to be found in the Insolvency Rules 1986, Form 4.25.

[190] Briggs [2013] *LMCLQ* 26, 29.

[191] *New Cap Reinsurance Corp Ltd v Grant* [2009] NSWSC 662, 257 ALR 740, [22-23] (Supreme Court of New South Wales).

[192] [1990] Ch 433, 461. See also *The Eastern Trader* [1996] 2 Lloyd's Rep 585, 600-601.

Fourthly, when a creditor writes to a solvent company demanding payment that is due, that action is not construed as a submission to any court.[193] Why should that same act take on a wholly different colour and be impressed with much more legal significance when the company is insolvent?

Fifthly, surely an additional step is required before holding that a creditor has submitted to the jurisdiction of the supervising court. If a creditor's proof is rejected by the insolvency office holder, he may appeal to the court; if he does so, then and only then can he be said to submit to the court's jurisdiction.

Sixthly, even if, as held in *ex parte Robertson*,[194] all creditors enter into a "compact" when they lodge proof of debt, the terms of this "compact" ought to considered carefully. When a creditor submits proof of debt, the creditor's purpose is to inform the liquidator or trustee in bankruptcy that he is owed money by the estate and that he wishes to be part of the collective distribution scheme. If the proof is accepted, the liquidator or trustee agrees to distribute whatever share of the assets that is due to the creditor in accordance with the applicable law. This is the basic "compact" entered into upon submission of proof. It is difficult to argue that the "compact" extends to the creditor submitting to claims that are brought by the estate *against* him without having to rely on the notion of implied consent to read much more into the compact. Of course, *Blohn v Desser*[195] would provide some authority, but it has been much maligned and with good reason. Apart from being contrary to prior

[193] A Briggs, "New Developments in Private International Law: A Busy Twelve Months for the Supreme Court of the United Kingdom", 5, Continuing Legal Education Programme, Supreme Court of Singapore, 21st Nov 2013 (on file with the author).

[194] (1875) LR 20 Eq 733.

[195] [1962] QB 116.

precedent[196] and since then judicially rejected,[197] implied submission should not suffice as a point of principle. For one, "implied" too often shades into "imputed"[198] and it need hardly be pointed out that imputed consent does not involve any tangible form of consent at all. For another, the doctrine of obligation underlies the common law recognition and enforcement rules; a judgment debtor is said to have obliged himself to obey the judgment of a foreign court of competent jurisdiction.[199] In the absence of an appearance by the judgment debtor to argue the merits of the case, default judgment will be handed down. To hold someone has obliged himself to obey a default judgment on the basis that he had impliedly submitted to the jurisdiction of the foreign court would be to stretch the doctrine of obligation too far because that obligation can only be fairly said to arise upon the "clear indication of consent to the exercise by the foreign court of jurisdiction …".[200] Further, the enforcing court is the last line of defence for the defendant and more ought to be required before the defence fails. Perhaps the additional factor of attending creditors' meetings tipped the balance in *New Cap*; but it is still difficult to see why this would render the Syndicate's actions as being more than implied consent at best.

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[196] *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670, 686; *Emanuel v Symon* [1908] 1 KB 302, 314.

[197] *Vogel v Kohnstamm* [1973] 1 QB 133; *Adams v Cape Industries* [1990] Ch 433, 465-466 *per* Scott J (aff'd on other grounds, [1990] Ch 433, 503 (CA)); *New Hampshire Insurance v Strabag Bau AG* [1992] 1 Lloyd's Rep 361, 372.

[198] It has been argued that the agreement in *Blohn v Desser* was imputed rather than implied: PB Carter, "Decisions of British Courts During 1961-1962" (1962) 38 *BYIL* 493, 496. Another example of when the two concepts get merged is that the search for an implied contractual choice of law may often be instead a search for an imputed choice of law (*ie* the objective proper law of the contract): *Amin Rasheed Shipping Corp v Kuwait Insurance* [1984] AC 50, 69 *per* Lord Wilberforce.

[199] *Williams v Jones* (1845) 13 M & W 628, 633; *Godard v Gray* (1870-71) LR 6 QB 139, 147; *Schibsby v Westenholz* (1870-71) LR 6 QB 155, 159.

[200] *Adams v Cape Industries* [1990] Ch 433, 466 *per* Scott J.

It seems appropriate at this juncture to ask a rather fundamental question: even assuming that there is some form of submission upon the lodging of proof, to whom does a creditor submit?[201] Any communication is between the creditor and the insolvency office holder; the creditor is not, at this stage anyway, in contact with the supervising court. If there is some form of submission, it is arguable that the creditor merely submits to the insolvency office holder, and not anyone else. Of course, it was held in *Ex parte Robertson*[202] that the creditor also submits to the court administering the insolvency proceedings, but as mentioned above, that case dealt with the issue of when an English court had jurisdiction over a creditor for the purposes of an English insolvency, and reciprocity is now acknowledged not to apply in the field of recognition and enforcement of foreign judgments.[203] The seventh point that could be made is thus: if there has been any sort of submission at all, it is merely submission to the insolvency office holder, not the supervising court.

The eighth point is that submission to the insolvency office holder should not be construed as submission to the court. It is true that a trustee in bankruptcy and a liquidator in a compulsory winding up are considered to be officers of the court.[204] However, a liquidator in a voluntary winding up does not have this status.[205] The difference in status seems to stem from the fact that bankruptcies and compulsory winding ups are court-controlled processes, whereas voluntary winding ups may proceed

[201] Briggs, "New Developments in Private International Law: A Busy Twelve Months for the Supreme Court of the United Kingdom", 5-6, 21st Nov 2013.

[202] (1875) LR 20 Eq 733.

[203] See *supra*, fn 71.

[204] *Donaldson v O'Sullivan* [2008] EWCA Civ 879; [2009] 1 WLR 924; [36]-[38]. See also *Re Oasis Merchandising Ltd* [1998] Ch 170, 186; *Re International Tin Council* [1987] Ch 419, 446; *Re Condon Ex parte James* (1873-74) LR 9 Ch App 609, 614.

[205] *Re T.H. Knitwear (Wholesale) Ltd* [1988] Ch 275, 288.

without reference to the court.[206] It is suggested that having submission to the court turn on whether proof was submitted in a court-controlled insolvency or voluntary liquidation is unrealistic. A creditor, unless he was involved in a creditors' voluntary winding up, would be unlikely to understand the difference between the various regimes, much less realise that he ought to act more warily in relation to one type of regime compared to the other- all he is concerned with is ensuring he gets a dividend. Further, it appears that a designation as an officer of the court primarily serves to enable the court to impose high standards of conduct on the trustee or liquidator and to supervise their conduct accordingly.[207] It does not have the opposite connotation of suggesting that the insolvency office holders' actions are on behalf of the court and their actions can be attributed to the court.[208]

[206] *Donaldson v O'Sullivan* [2009] 1 WLR 924, [38].

[207] Trustees in bankruptcy and liquidators in compulsory winding ups have the obligation to act "in an honourable and high-minded way": *Ex parte Simmonds* (1885) 16 QBD 308, 312. This is in accordance with the principle in *Re Condon Ex parte James* (1873-74) LR 9 Ch App 609. While the court has an independent power to review the conduct of trustees in bankruptcy and liquidators in compulsory winding ups as officers of the court, statutory controls are also in place: see Insolvency Act, ss 168(5) and 167(3). The conduct of liquidators in a voluntary winding up is also subject to statutory control by the court: see Insolvency Act 1986, s 112 (conferring on the court in relation to a voluntary winding up the same powers, such as those under ss 168(5) and 167(3), which the court might exercise if the company were being wound up by the court) and s 212(3) (conferring on the court the power to examine the conduct of a liquidator). See generally A Keay, "The Supervision and Control of Liquidators" [2000] *Conv* 295.

[208] In fact, liquidators enjoy a lot of freedom as to how the winding up ought to be conducted: Keay [2000] *Conv* 295, 296.

Moreover, the more conventional understanding of the role of liquidators in general is that they act as agents for the company,[209] rather than for the court.[210]

(iii) Conclusion on submission and *New Cap*

What amounts to "submission" in the context of foreign judgments rendered in insolvency proceedings is a question on which there is much to be said for either side of the argument.[211] A subtle approach is required to tease out the correct answer. It is suggested that when it is asked, upon lodging of proof, *what* and *who* the creditor has purportedly "submitted" to, the answer becomes clearer. On balance, it is submitted that a creditor has not submitted to a foreign court's jurisdiction by the mere act of lodging proof.

Given the majority's firm insistence in the *Rubin* appeal that no special concession ought to be made for judgments rendered in the context of insolvency proceedings, the Supreme Court's judgment in the *New Cap* appeal is surprising. It is unlikely that, given the thrust of the reasoning in *Rubin*, the Supreme Court thought itself to be doing anything other than applying the orthodox principles when it decided that the Syndicate had submitted to the New South Wales court. For the reasons that have been given above, it is respectfully suggested that the Supreme Court's decision in *New Cap* is unfounded, and at odds with its conclusion in *Rubin* that judgments in insolvency proceedings are to be treated like any other judgments.

F. Overall Conclusion

[209] *Knowles v Scott* [1891] 1 Ch 717.

[210] As agent for the company, the liquidator owes statutory and fiduciary duties to the company and the class of creditors as a whole: Goode, *Principles of Corporate Insolvency Law*, 4th edn (2011), 152.

[211] It has been suggested that "participation" is a better label than "submission": see Crystal, Cohen and Al-Attar, "Thwarting Dissenting Creditors", 6, South Square Digest, Nov 2013.

Globalisation has increased the significance of cross-border insolvencies. The Supreme Court's decisions in *Rubin* and *New Cap* raise important questions on exactly how far the common law ought to go in support of the efficient management of cross-border insolvencies, specifically the extent to which our private international law rules ought to be tweaked to accommodate this objective.

To sum up, it has been argued that:

1. Judgments in insolvency proceedings can be sufficiently differentiated from "other" proceedings.

2. An appropriate rule for recognising judgments in insolvency proceedings would be to consider that a foreign court has international jurisdiction at common law when that court provides the location of the debtor's COMI. This rule ought to be accompanied by a more generous interpretation of defences that could be raised against recognition and the addition of appropriate insolvency-specific defences.

3. Nonetheless, this is not a development that should be up to the courts but rather Parliament.

4. The interpretation of "submission" by the Supreme Court in the *New Cap* appeal is unfounded.

Essentially, the conclusions reached in this article support the orthodox over the ground-breaking. Ground-breaking ideas are usually more intellectually appealing, with the connotation of a progressive and enlightened mindset.[212] Favouring the norm may instead raise suspicions of narrow-mindedness. However, in this instance, it is submitted that supporting the application of the traditional rules on recognition and enforcement of foreign judgments to judgments in insolvency proceedings is not a matter of provincialism; rather, it is based on sound legal reasoning.

[212] Borrowing the language of Tung (2001-2002) 23 *Mich J Int'l L* 31, 36 (on cooperative ideas).